

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

NATIONAL GRID USA
SERVICE COMPANY, INC.

and

Case No. 1-CA-42703

UTILITY WORKERS UNION OF
AMERICA, AFL-CIO, LOCALS
310, 317, 322, 329, 330
and 654

Emily Goldman, esq.,
for the General Counsel
Glenn E. Dawson, esq.,
of Boston, Massachusetts for the Respondent
Jonathan M. Conti, esq.,
of Boston, Massachusetts for the Unions

DECISION

Statement of the Case

Eric M. Fine, Administrative Law Judge. This case was tried in Boston, Massachusetts on January 31, 2006. The charge and amended charge were filed by Utility Workers Union of America, Locals 310, 317, 322, 329, 330 and 654, AFL-CIO (the Unions) on July 20, 2005, and October 20, 2005, against National Grid USA Service Company, Inc. (Respondent).¹ The complaint issued on October 25, 2005, and alleges Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide the Unions with relevant and necessary requested information. Respondent, in its answer, has denied violating the Act, as alleged and has raised certain affirmative defenses.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent,² I make the following³

¹ All dates are in 2005 unless otherwise stated.

² By unopposed motion dated February 28, 2006, counsel for the General Counsel moved for the admission into evidence of a decision and award issued by an arbitrator on February 15, 2006, and a copy of Respondent's brief to the arbitrator. The motion is granted and the motion is admitted into evidence as General Counsel's Exhibit 2(a), the arbitration decision and award is admitted as General Counsel's Exhibit 2(b), and Respondent's brief to the arbitrator is admitted as General Counsel's Exhibit 2(c).

³ In making the findings herein, I have considered the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera*

Findings of Fact

I. Jurisdiction

5 Respondent, a wholly owned subsidiary of National Grid, a British Company which owns and operates several electric distribution companies in the northeastern geographic area of the United States, including Massachusetts Electric Company and Narragansett Electric Company, has maintained an office and place of business in Westboro, Massachusetts, where it is engaged in providing common services including, legal, accounting, safety, environmental and labor relations to National Grid's electric distribution companies. During the calendar year ending December 31, 2001, Respondent in conducting the above described business operations derived gross revenues in excess of \$250,000 and purchased and received at its Massachusetts facility, goods valued in excess of \$5000 directly from points outside of Massachusetts. The Respondent admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Unions are a labor organizations within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

20 The Unions involved in this case represent bargaining units which include Respondent's meter service employees in various locations in Massachusetts and Rhode Island. Meter service employees include meter readers (MRs) and meter worker associates (MWAs). MRs go in the field for residential and commercial accounts to record information from customer meters to generate bills for electrical use. An MWA is a higher level position than a MR. MWAs perform the duties of an MR, but also make collections on delinquent accounts. If the delinquent account is not paid, the MWA locks out the meter or turns off the electricity. Once the delinquent account is paid, the MWA returns to the location, turns on the electricity, and locks in the meter.

30 Emerson Teal was called as the only witness for the General Counsel. He was the president and business manager for Local 654 for three and ½ years until resigning on January 27, 2006.⁴ Teal credibly testified to the following: On March 18, Teal, along with the presidents of the involved local unions attended a meeting with Respondent officials including Kathy Lyford, the director of meter services for New England, Ray Reyes, director of labor relations, and Anne Grehoski, principle human resources representative. During the meeting, Lyford told the union officials the Respondent was looking into subcontracting excess collections work, and they would be talking to the Unions to discuss alternatives to outsourcing the work. Excess collections are delinquent accounts that Respondent is unable to act upon due to staffing levels. Respondent, under Massachusetts and Rhode Island regulations, is only permitted to turn off meters on delinquent residential accounts from April 15 to November 1. In the past, Respondent temporarily upgraded MRs to perform MWA collections work, and on occasion the position of meter worker would also performed collections. The MR receives a \$2.50 an hour

45 *Corporation*, 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951). Further discussions of the witnesses' testimony and credibility are set forth throughout this decision.

50 ⁴ At the time of his testimony, Teal worked for Respondent as an underground supervisor and he was no longer a member of the bargaining units at issue. I found Teal, considering his demeanor and the content of his testimony, to be a credible witness to the extent his memory would permit. The following sequence of events is based on Teal's credited testimony, as supplemented by documentary evidence, and the testimony of Respondent's witnesses.

pay increase when performing MWA collections work. Respondent brought in temporary help to perform the MRs work when the MRs were upgraded to MWAs.

Teal's testimony reveals: Respondent's officials met with representatives of the Unions on June 1 to discuss the excess collections. Teal attended along with all of the other local presidents. Lyford, Reyes, and Grehoski were among those who attended for Respondent. The union officials were asked if they were willing to allow temporary workers to perform the excess collections at 75 percent of the MR rate of pay. The union officials were told a request for proposals (RFP) issued to potential contractors for bids to perform the excess collections work. Teal requested a copy of the RFP from Lyford and Reyes as did the local presidents. Lyford's response was Respondent would check the RFP to see if there was anything relevant Respondent needed to provide. Teal requested the RFP because of a concern on how subcontracting the work would affect the pay, working conditions, and work performed by bargaining unit members. Teal wanted to know what the working conditions for the contractors would be. The union officials asked questions as to the work the contractors would be performing, the location, their pay, and whether they would interact with bargaining unit employees with the idea bargaining unit employees, not contractors should perform the work.

On June 8, Teal, along with the other local union presidents, attended another meeting with Respondent officials, including Lyford and Reyes. Respondent did not provide the Unions with the RFP during the meeting or thereafter. Rather, on June 8, Lyford provided the Unions with a single sheet summary intended to address the questions raised during the June 1 meeting. The document states:

Augmenting National Grid Employees with Contractors for Excess Collections RFP Highlights

- * Payment structure will be by collection task – collect payment, lock in or lock out
- * no OT
- * Contractors to augment Grid Employees for excess collections – RI and MA only
- * Due to the high volume and seasonal nature of work (only 5-6 months/yr)
- * Length of contract 2005 to end October, 2006 and 2007 –mid April to end of October
- * Contractor must comply with contractor safety policy
- * Must be flexible to move to where work is. Volume of collections may vary day to day. i.e. collections follow the meter reading cycles
- * Contractor provides the field workers, supervision, dispatching, transportation, communication (cell phones), tools (per Co. provided list), and safety gear required to comply per Co. Contractor safety policy and procedures, uniforms according to Co. standards
- * Company will furnish: ID badges, magnetic signs for field workers vehicles, meter locking rings, meter seals, security keys, disconnect sleeves, plastic socket covers, gray socket adapters, and any required literature that must be delivered to the customer at the time of the disconnect
- * Contractor personnel may occupy Co. facilities in MA and RI
- * Contractor must wear Contractor provided uniforms and required PPE
- * Contractor to dispatch own work
- * All Collection procedures will be the same as Grid employees

Teal testified the Unions were told by Lyford, at the June 8 meeting, that Respondent's RFP summary described the working conditions for the contractors performing excess collections.

The Union officials responded this was not the information the Unions requested and the Unions repeated their request for the RFP. Teal testified the Unions informed Respondent's officials that Respondent's telling the Unions what was in the RFP, and what Respondent thought the Unions should know was not sufficient in place of providing the actual document.⁵ Teal testified that during the meeting the parties bargained about alternative means of performing the excess collections work rather than contracting it out.⁶

The parties attended another meeting on June 16. Teal testified the Unions repeated their request for the RFP to Lyford and Reyes. They responded they did not see relevance or necessity of it because Respondent had told them what they were going to be doing. Teal testified that, at the meeting, no other reason was given for the Employer's refusal to provide the RFP. Teal testified the Union officials again explained the summary of the RFP was not satisfactory because they did not know if it was accurate or complete, and "We didn't know what we didn't know...". Teal testified the Unions felt the summary was what Respondent wanted to tell them and "We didn't know what was in there that could have relevance on a potential grievance." Teal testified the Unions explained to Respondent's officials that they wanted to see what Respondent was going to be doing and its impact on bargaining unit employees, for example if a contractor employee locked a meter up for non-payment, the Unions wanted to know if bargaining unit members would have to lock the account back in. Teal testified the Unions raised questions about the hours of work of the contract employees, the work they would be doing, training, and their interaction with bargaining unit members, and what accounts they

⁵ Teal testified the RFP summary did not answer all of the Unions' questions, they were not sure of its accuracy, or if it contained all the information in the RFP that would be useful in a grievance. He testified the summary, "just didn't give us enough information...".

⁶ Reyes confirmed that Teal asked for the RFP a number of times both on June 1 and June 8. Reyes testified that on June 8, the Unions questioned whether the RFP summary was complete and accurate and that they wanted the RFP to compare it with the summary. Reyes told the union officials Respondent would look into supplying the complete document. Reyes testified Local 310 President Phil Bowe said, "Well just tell us yes or no. One way or the other we're going to file a charge." Reyes testified that, during the parties' meetings, Respondent asked the Unions for the relevance of the RFP, and the Unions never said why it was relevant and never explained why they did not trust the Employer. Reyes testified when the Unions were provided the RFP summary, they asked questions about the work of the contractor. He testified when the Unions asked about contractor's payment structure, they were told all Respondent knew was that the contractor's employees were going to be paid on a per task basis. Respondent suggested the Unions could find out how much the contractor's employees were going to be paid by calling the contractor to apply for jobs. Reyes testified the contractors' bids would estimate their costs including rates of pay for their employees, but bids were not due until June 13, and the Unions requested the information prior to that date. Reyes also testified the contractor's rates of pay would be included in the contract between Respondent and contractor once that company became the successful bidder. Reyes testified that pursuant to their questions the Unions were told the contractor would be working on commercial and residential accounts and the contractor's work would be gathered by the working leaders, a bargaining unit classification, who would set aside the contractor's work by towns. Working leaders also lay the work out on a daily basis for bargaining unit members. The Unions were told the contractor's employees would wear similar uniforms to Respondent's employees, they would have company ID badges that would say contractor on them, they would use their own vehicles, and Respondent would supply magnetic signs to identify them as contractors of National Grid. Reyes thought this information was in the contract or RFP.

would be collecting on, was it only excess, was it only residential, would they be locking out on Fridays, which Respondent did not do on a regular basis, in particular relating to residential accounts. Teal testified the Unions asked about working conditions that were not addressed in Respondent's written summary. Teal testified Respondent provided some of the information through verbal responses to the Unions' questions.

Teal testified that, during the three bargaining sessions held in June, alternatives to contracting out the excess collections work were discussed. The Unions' main proposal was that Respondent upgrade the MRs to MWAs and have them perform the excess collections work, and backfill the MR position with temporary employees. The Unions stated this was what their contracts required. Teal testified the Unions made another proposal that employees who were on light duty, if capable, perform the collections work. Teal testified Respondent informed the Union's there were only one or two people on light duty capable of performing the excess collections work. Teal testified the Unions did not drop this proposal. Teal testified Respondent rejected the Unions' proposal to upgrade the MRs to MWAs, which was the Unions' last proposal. Teal testified Respondent's only proposal was Respondent would bring in temporary employees to do the excess collections work and pay them 75% of the MR pay rate, which the Union rejected. He testified the Unions took the position they could not agree to anything but an upgrade of the MR position because they could not agree to have the upgrade money taken away from their members.

On June 20, Teal was copied an email to the Local Unions which contained an attachment dated June 17, from Lyford in the form of a memorandum concerning "Excess Collection Work." Lyford stated in the memo that the parties were at impasse in their proposals on excess collections work, and "the Company has decided to have it performed by outside contractors."⁷ Teal responded by an email dated June 21, to Respondent's officials stating the Unions has not received the information they requested at the three meetings in June. Teal stated, "I am again requesting a copy of the RFP sent out to contractors by the Company. As stated, this does not need to include costs."

By letter dated June 30, Reyes responded to Teal, concerning "Contracting Out of Excess Collections Work." In the letter Reyes stated:

You have requested the Company provide you with the "Request for Proposal" (the RFP) which the Company has issued to bidders for this work. The Company agreed to review the RFP to consider the relevance and necessity of the document to the administration of the collective bargaining agreement. After review of the RFP, the Company does not see why the information included in much of the RFP is relevant and necessary to the Union's administration of the collective bargaining agreement or to its negotiations with the Company over this issue. Moreover, the Company has never released an RFP to any party outside of the bidding process because all bidders are assured confidentiality with respect to the process.

The Company has provided you with a summary of the scope of the work and the standards to which the contractor will be required to adhere in performing the work. In the Company's view, this fully satisfies its obligations under the law with respect to its providing the Union with information which is relevant and necessary to the administration of the contract and the negotiation process.

⁷ Respondent's excess collections RFP issued electronically on June 1. The bid closing date was June 13 and Respondent selected the successful bidder on June 17, and implemented the contract on June 20.

By letter to Lyford, dated July 1, Union attorneys Michael Feinberg and Jonathan Conti requested copies of the RFPs for the contracting out of the “Excess Collection of Delinquent Customer Accounts” and copies of all contracts between Respondent and the winning bidders. It is stated in the letter the information was necessary, “in order to administer the collective bargaining agreements between the UWUA Locals and National Grid...”.

By letter dated July 7, to Feinberg, Respondent attorney Glenn Dawson stated:

The Company fails to see why the information requested is relevant and necessary to the Unions’ administration of the collective bargaining agreement. Additionally, there are legitimate confidentiality concerns associated with the Company’s bid process. For these reasons, the Company respectfully declines to provide you with the requested information.

However, if you wish to indicate to the Company the specific information which you believe is contained in the requested documents and why said information is relevant and necessary to the Unions’ administration of the contract, the Company will, of course, reassess its legal obligation to provide you with this information in an alternative form.⁸

By letter dated July 8, to Lyford from Feinberg and Conti the Unions filed a “grievance protesting the Company’s decision to use outside contractors to perform the excess collection of delinquent customer accounts.” It is asserted in the letter Respondent violated various articles of the collective bargaining agreements, including Article I(A)(Recognition), III (Management Rights), IV (Seniority), V (Filling of Vacancies), and IX (Compensation). The letter requested the matter be referred directly to arbitration since Respondent had informed the Unions outside contractors would begin the work around August 8.

By letter dated July 11, Feinberg and Conti responded to Dawson’s July 7, letter stating:

It is the Unions’ position that the information is relevant and necessary to their ability to effectively police their respective collective bargaining agreements with National Grid.

As you are aware, the Unions have filed a joint grievance contesting the Company’s decision to use outside contractors to perform the excess collection of delinquent customer accounts. The Unions believe that this work is bargaining unit work that should be performed by their members. The Unions need this information to determine the amount, under whose direction and supervision the work will be performed, and the type of work that will be performed by the outside contractors.

Thus, the Unions reiterate their request for copies of the RFPs for the contracting out of this work, as well as all contracts between the Company and the winning bidders(s).

The Unions are willing, however, to accept the requested documents with certain ‘confidential’ information, such as the economics, redacted. The Union’s focus is on determining the amount and type of work to be performed by the outside contractors. There should be a way to provide this relevant information without running afoul of any confidentiality concerns.

Please have the Company provide this information within three business days of the receipt of this letter. If you send the information in a redacted format, kindly inform us as to the nature and character of the redacted information. If we do not hear from you

⁸ Teal testified, in reference to Dawson’s claims of confidentiality that Respondent never informed the Unions what information in the RFP and in the contracts with the successful bidder Respondent considered confidential.

within three days, we will be forced to file an unfair labor practice charge with the National Labor Relations Board.

Dawson responded by letter dated July 14. Dawson cited Respondent's typewritten summary concerning collections which Respondent had previously provided the Unions stating it contained the same information contained in the RFP and the contracts with the subcontractor. Dawson went on to state Respondent fails to see why the summary does not satisfy the Unions' request for information since the "NLRB's standard regarding information furnished by an employer in response to a union's information request is one which focuses on the sufficiency of the information which has been provided and not the form in which it has been provided." Dawson stated, "if the Union has follow-up questions regarding the information provided in this summary then the Company will provide it to the Union to the extent that it is relevant and necessary to the Union's administration of the contract. However, the Company does not acknowledge that it has any legal obligation to provide this information to the Union in the form in which you have requested it, namely, the RFP and the final contract which has been entered into between the Company and the successful bidder for the work."

On July 20, the Unions filed their initial unfair labor practice charge alleging Respondent violated the Act by refusing to furnish relevant information necessary for the policing of the collective bargaining agreement and the processing of grievances. The amended charge filed on October 20, states the information was also necessary for collective bargaining purposes.

Teal attended a July 21, meeting between Respondent and the Unions with the purpose of allowing the Unions to ask questions about the work the contractors would be doing. Teal testified Respondent's officials answered all questions that were asked at the meeting and that during the meeting the Unions were told the following: The name of the contractor was Contract Callers Inc., (CCI) and they would be working in Lincoln, Hopedale, Brockton, Worcester and Malden. There would be between 11 to 15 contractor employees. CCI would provide its own equipment and vehicles, which would contain Respondent's metallic logos. CCI employees would wear the same uniforms as Respondent's employees, and would be held to the same safety procedures and performance standards. CCI employees would be subject to the same criminal background checks Respondent's employees receive. CCI's work schedule would be Monday through Friday, 8:00 a.m. to 4:00 p.m., and they would not work overtime. CCI would dispatch and supervise its work. CCI employees would be assigned to a specific city but flexibly assigned depending on where Respondent needed excess collections. CCI employees would do collections and lock in or lock out meters for non-payment. During the meeting, the Unions requested and Respondent officials agreed that Respondent would send representatives to the field to talk to the bargaining unit members to discuss what CCI employees would be doing.⁹

Teal testified that during its meetings with Respondent, the Union was told the contractors would be paid on a per task basis. Teal testified if Respondent had an agreement for the contractor's employees to work outside of 8:00 to 4:00 hours, or do collections on a Friday on a residential client, which the bargaining unit employees do not do, this could impact on the unit. Teal testified the Unions wanted to know the wages the contractor's employees would be receiving because the Unions were told it was cost effective to subcontract out the

⁹ Reyes testified the July 21 meeting was requested by George (Bing) Fogarty, a national rep for the Brotherhood of Utility Worker's Council of the Utility Workers of America. During the meeting, Fogarty made a request for Lyford to address all of the workers, answer their questions, and explain why Respondent was contracting out the work and how it would affect their jobs. Lyford agreed and the meetings with employees took place in August.

work, and it had not been that way in the past. Teal testified the Unions wanted to see the requested documents to know if there was anything else Respondent had agreed to with the contractor that Respondent was not informing the Unions of, as well as questions that were not asked by the Unions because of lack of knowledge. Teal testified the Unions received certain information but did not know it to be true. Teal testified "We don't know what is in there that could effect the collective bargaining agreements that the unions have with the company and the working conditions of the employees." Teal testified Respondent informed the Unions that if a contractor employee locked out an account, a contractor employee would handle the associated lock in. Teal testified he subsequently learned that this was not the case, and that the lock ins of some contractor lockouts were being performed by bargaining unit employees. Teal testified this was a change for bargaining unit employees as they were now interacting with the contractor's employees by following up work that they had done. Teal thought it was a violation of the contract.

On July 28, Fogarty wrote Reyes and asked for information regarding "Contracting Out of Excess Collection Work." Fogarty stated the information was needed to "fulfill the union's contract administration and bargaining responsibilities. Fogarty requested: 1. Wages, compensation and benefits that will be provided; 2. Hours of employment; 3. Days of relief; 4. Duties associated; 5. Incentives. Reyes responded as follows by letter of August 10:

1. Wages, compensation and benefits that will be provided

The Company is paying Contract Callers by unit pricing method according to the outcome of each field visit and understands field representatives for Contract Callers are paid in a similar fashion. The Company has no specific knowledge of the payment structure of wages, compensation or benefits Contract Callers provides its employees.

2. Hours of employment

The Company has instructed Contract Callers only to perform collection stops Monday through Friday, from 8 A.M. to 4:00 p.m., and lock-ins must be completed in 24 hours. The Company has no specific knowledge of the hours and days of work for Contract Caller employees.

3. Days of relief

The Company has no specific knowledge of the hours or days of work (including days of relief) for Contract Caller employees.

4. Duties associated

The Company has contracted with Contract Callers to collect money from assigned electric service accounts, lock-out service for non-payment, and lock-in service as directed.

5. Incentives

The Company feels wages, compensation and benefits (including incentives if any) that a contractor pays its employees is privileged in the employer-employee relationship. Please indicate why such information is relevant and necessary to the Union's administration of the collective bargaining agreement so the Company may assess its legal obligation to provide it.

Teal testified the information provided by Reyes did not satisfy the Unions' request for the RFP or contracts, because it did not inform the Union what was in the RFP, how it would affect bargaining unit members and the Unions could not verify the accuracy of the responses. Teal testified the details of how a contractor would perform the excess collections work had relevance as to what the contractors would be doing in taking work from unit employees.

Reyes attended the excess collections arbitration hearing held on December 2. Reyes had received a subpoena from the arbitrator, requested by the Union's attorneys, requiring

Reyes to bring a copy of the RFP and of the CCI contract to the hearing. Reyes testified to the following: In their opening statement to the arbitrator the Unions requested the RFP and contract be placed into evidence. Respondent's counsel objected raising a number of issues including the relevance of the documents, whether the subpoena was enforceable in
 5 Massachusetts, and that Respondent had provided all of the information to the Unions in an alternative form. Respondent's counsel argued the arbitrator had no authority to enforce the subpoena and the arbitrator, not the Unions, would have to go to court to enforce it. The arbitrator was told a charge had been filed over the information request with the National Labor Relations Board. The arbitrator described three options, one was to have the Unions go to court
 10 to enforce the subpoena, the other was for him to take an adverse inference, and the third was for him to look at the material in camera to decide whether it was relevant. The arbitrator did not take any of these actions. Rather, Respondent's counsel suggested they go forward and the arbitrator could make a decision on the subpoena later on if he felt it was necessary. The Unions agreed to go forward but were not giving up their right to have the subpoena enforced.
 15 The Unions called Lyford as the only witness, and Respondent did not cross exam her. Prior to resting, the Unions did not renew their request that the arbitrator enforce the subpoena.

On February 16, 2006, the arbitrator issued his award concerning the Unions' grievance over the use of outside contractor employees to collect delinquent payments and lock in and out
 20 meters. The arbitrator stated at page 8 of his decision that:

Before this case arose, whenever the Company increased efforts to collect delinquent accounts during the non-moratorium period, it supplemented employees performing collections and meter lock in/lock outs by temporarily upgrading MRs to a higher paying
 25 job classification – after 1999, the MWA title, and before 1999, the MW title – and assigning those duties to them. And when necessary, the Company hired temporary employees to fill lower paying MR positions.

From approximately 2002 unit this case arose in 2005, the Company apparently made no special efforts to collect from delinquent residential customers during the non-
 30 moratorium period, nor did the Company augment the number of employees performing collections work.

The arbitrator found Respondent contracted with CCI to collect delinquent payments and to perform associated lock out/lock in work and CCI performed limited operations in 2005 for
 35 Respondent. The arbitrator stated Respondent intends to expand the program in the future, and noted its contract with CCI includes 2006 and 2007. The arbitrator, in finding for the Union, held there was a binding past practice that when Respondent chose to augment its workforce to perform field collections work of temporarily assigning MRs to the higher paying MWA position and backfilling the MR classification with temporary employees. The arbitrator stated Article III,
 40 Section 3(a) and (b) of the management rights clause in two of the three applicable collective bargaining agreements provides that established past practices will not be changed during the term of the contract, and the arbitrator found Respondent's prior staffing for augmenting its workforce for collections work met the requirements of an established past practice within the definition of the contractual management rights clauses. The arbitrator found that, although the
 45 contract with Local 654 did not contain the past practice language, a contract need not contain an express past practice provision for a past practice to become binding on the parties.¹⁰

50 ¹⁰ The arbitrator's complete rationale for finding in favor of the Union can be found in his award and is not repeated herein.

The arbitrator found as a remedy that Respondent “shall make whole Meter Readers and Meter Worker Associates in Worcester and Malden, Massachusetts, who lost the opportunity to perform field collection work and lock in/lock out work, in accordance with their seniority, during the period that CCI employees performed bargaining unit work in 2005.” The arbitrator retained jurisdiction in the event the parties could not agree on the amount of back pay. The arbitrator refused the Unions’ request to issue a cease and desist order foreclosing Respondent from hiring contractor employees to perform this work in the future stating that in general, “arbitrators lack the authority to issue cease and desist orders but may only remedy a violation in the immediate case before them.”

A. The testimony of Respondent’s witnesses on the decision to deny the Unions’ request for a copy of the RFP and related contracts

Reyes testified he was involved in the decision to deny the Unions’ request for the RFP and the contract with CCI. Reyes spoke with Bill Dowd, vice president of human relations, and with outside counsel concerning the request. Reyes testified the decision not to provide the RFP was based on Respondent’s view that it had a right to subcontract the work under the contractual management rights clause. He also testified it was discussed this was a mandatory subject of bargaining, so Respondent bargained with the Unions to try to reach an alternative to outsourcing the work. Reyes testified the Unions never stated the relevance of the requested information and Respondent’s officials felt they had done a good job in providing the information to the Unions in that they answered every question asked.

Reyes testified there was also a confidentiality issue pertaining to the requested information. Reyes testified a number of Respondent’s requests for proposals (RFPs) can involve issues with legal ramifications in that the Department of Telecommunications and Energy in Massachusetts (DTE) and the Public Utilities Commission in Rhode Island (PUC) are concerned with Respondent’s operations. Reyes testified those departments direct the moratorium period in collections and Respondent’s rate structure. Yet, Reyes testified the RFP in dispute concerning excess collections work was “Probably (a) very low risk problem.” Reyes testified there was probably a very low concern relating to the DTE and PUC concerning the Unions’ information request. Reyes testified that, when the union officials requested the RFP during negotiations, “I told them that first of all I hadn’t read it. I hadn’t seen it. I didn’t know what the relevance was. I wanted to talk to the people in the supply chain and talk to them about it.” Regarding the RFP, Reyes testified, “I haven’t looked at it since last June. And at that time I don’t think I looked at it specifically to say that any one aspect of that was confidential.” Reyes testified he did not know whether there was anything particularly sensitive in this particular RFP except Respondent had a practice of not disclosing RFPs and they required the bidders to sign off on a confidentiality agreement. Reyes testified concerning the RFP, “I can’t recall my review of it back in June if that there was anything that identified confidentiality to me.”

Lori Rounds is employed by Respondent as a principle purchasing agent in its procurement department. Rounds works with internal customers to procure services from outside contractors. The procurement process involves a project manager of a user group contacting procurement to describe the service needed. Procurement then works with the project manager to formulate an RFP. The project manager is responsible for the technical specification concerning the tasks to be performed by the outside contractor, while procurement compiles the commercial requirements for an RFP. The formulation of the RFP is coordinated between procurement and the internal use group. Once the RFP is assembled it goes out for bid, and the bids are submitted electronically via email to an electronic lock box to procurement for review. Procurement then forwards the bids to the project manager. The project manager and the user group are responsible for the technical evaluation of the bid and procurement is

responsible for the commercial evaluation. Procurement makes a recommendation to the user group and the user group is the ultimate decision maker as to which contractor gets the job.

During the bidding process and prior to awarding the contract, the project manager and their team have access to the RFP. The team is generally non-union individuals from the group requesting the services such as engineers, other professionals, and department heads. Depending on the complexity of a project, the environmental and safety departments may determine if there are any environmental or safety requirements that need to be part of the RFP. However, those departments generally do not look at the RFP. Rounds testified the legal department may be asked to comment on terms and conditions various bidders may have.

Rounds testified Respondent has a corporate policy to maintain confidentiality of the RFP and all contracts that result from it. She testified there are multiple occasions in the RFP bidding process where Respondent states the information provided is confidential. Many of Respondent's bids are offered on a website for which Respondent provides a link and a password to bidders. Upon entering the link, but before accessing the RFP, a confidentiality statement is displayed which states by logging in and accessing the documents the bidder has accepted Respondent's confidentiality requirements.¹¹ For the excess collections RFP all of the bidders, before they could access the documents, had to agree to the confidentiality language as part of getting into the website. Rounds testified that, early within the RFP itself, there is a section called information and instructions, where there are several different articles that describe the confidential nature of the RFP and other documents. She testified the RFPs always contain confidentiality language.¹²

Rounds testified once a project has been awarded, Respondent implements a contract with the selected bidder. The contract contains the technical specification and it also contains the terms and conditions that were originally included with the RFP. Those terms and conditions have language that describes the confidential nature of all the contract documents. The contracts are held within procurement, and at times, depending on the project, a copy of the contract will be sent to Respondent's legal department. The project manager receives a copy of the contract and the vender receives a copy of the contract.

Rounds testified the procurement department processes hundreds of contracts per year for outside services and in 2005, procurement processed over 300 RFPs. Rounds testified there are several reasons why Respondent has the confidentiality requirement. She testified

¹¹ The confidentiality screen reads:

National Grid considers any information provided to Bidders in the course of business to be privileged and confidential between Bidder and National Grid. This includes, but is not limited to, written data of any kind, business information, request for quotation, specifications, engineering data and any and all technologies and data either obtained or observed while supplying the commodity/service required by the contract. Unauthorized disclosure of information to third parties by Bidder may lead to revocation of RFP invitation to bid, cancellations of contract, loss of future business opportunities and/or the effects of any other remedies which may be available to National Grid.

By proceeding to review the RFP documents, Bidder agrees that it understands and accepts the confidentiality requirements of this RFP.

¹² Rounds testified that, depending on the nature of the work, Respondent may also have a stand alone non-disclosure agreement that bidders must sign before they are given the RFP documents. However, she testified this was not required for the excess collections RFP, which was only a web based RFP.

first and foremost Respondent wants to maintain a level playing field for all bidders. They want bidders to receive the same information at the same time so no bidder has a competitive advantage during the bid process. Rounds testified sometimes the RFPs contain sensitive company information that could cause regulatory concerns, or public relations issues, or political problems if the information were to be distributed without sufficient background. She testified it could also be problematic if information got out before the Respondent was ready to make certain projects public. Rounds testified that on a rare occasion, Respondent may terminate a contract in which case they would have to negotiate with the second highest bidder or they may have to re-bid. In order to maintain the integrity of the process and to not give any undue advantage to any vendors Respondent strives to maintain information confidential even after a contract is entered into.

Rounds admitted there were no environmental concerns regarding disclosure relating to the RFP for excess collections. Rounds testified even after the bid process is completed and the contract is awarded, Respondent believes it is necessary to maintain the confidentiality of the RFP documents because there may be technical information therein that is sensitive to Respondent's operation as a regulated utility. However, Rounds admitted this factor did not apply to the RFP in dispute. She also testified there are concerns with respect to Respondent's employees having access to RFP information because employees sometimes have opportunity to come in contact with vendors who want to work for the Respondent. She testified there may be information that is transferred to vendors that may give them a competitive advantage, or may put Respondent at some type of risk. Rounds testified Respondent has many retirees who go to work for consulting firms or contractors that may be able to gain some kind of an advantage if this information were available to them.

Rounds testified she reviewed the excess collections RFP and that the confidentiality concerns with respect to this RFP included information showing the number of and types of collections that were done. She testified that, in order for the bidders to provide cost estimates for the work, Respondent has to give them the projects technical requirements and the volume of the work. Respondent gave the bidders a representative sample of data concerning the amount of collections to be done to give them an idea of the size of the project. She testified this information was sensitive. The following exchange took place during Rounds' testimony:

JUDGE FINE: Was there anything else that was sensitive in your view?

THE WITNESS: That would be -- in my view that would be the most sensitive of the information that we had.

When asked if there was anything else Rounds testified, "That's the thing that comes to mind for me. For this particular RFP." Rounds was not involved in Respondent's decision not to provide a copy of Respondent's contract with CCI to the Unions.

Rounds identified a document pertaining to Respondent and its affiliated companies entitled, "Terms and Conditions for Service Firm Purchase Orders." She testified the document contains conditions included in the RFP in dispute as well as in Respondent's contract with CCI. Article 14.1 of the document reads as follows:

Notwithstanding any other provision of the Purchase Order, the Service Firm recognizes that the Company or its affiliates may find it necessary or desirable to make information available to the Service Firm, its Subcontractors, or their employees which is deemed proprietary and/or confidential information (Information). In this regard, it is agreed that neither the Service Firm, nor its Subcontractors, nor their employees shall without the prior written approval of the Company, at any time disclose to third parties any

Information which may be disclosed to them or to which they are given access during the performance of the Work, or to publish the Information at any time, whether during the term of the Purchase Order or thereafter.

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B. Analysis

In *Ormet Aluminum Mill Products*, 335 NLRB 788, 801 (2001), a case in involving requests for information pertaining to subcontracting, it was stated that:

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In *A-Plus Roofing, Inc.*, 295 NLRB 967, 970 (1989), enfd. *NLRB v. A-Plus Roofing, Inc.*, 39 F. 3d 1410 (9th Cir. 1994), the applicable principles concerning requests for information were set forth as follows:

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An employer, pursuant to Section 8(a)(5) of the Act, has an obligation to provide requested information needed by the bargaining representative of its employees for the effective performance of the representative's duties and responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). The employer's obligation includes the duty to supply information necessary to administer and police an existing collective bargaining agreement. (Id. At 435-438), and if the requested information relates to an existing contract provision it thus is "information that is demonstrably necessary to the union if it is to perform its duty to enforce the agreement...." *A.S. Abell Co.*, 230 NLRB 1112, 113 (1977). Where the requested information concerns employees ...within the bargaining unit covered by the agreement, this information is presumptively relevant and the employer has the burden of proving lack of relevance....Where the request is for information concerning employees outside the bargaining unit, the Union must show that the information is relevant. *Brooklyn Union Gas Co.*, 220 NLRB 189 (1975); *Curtiss-Wright Corp.*, 145 NLRB 152 (1963), enfd. 347 F.2d 61, 69, (3d Cir. 1965). In either situation, however, the standard for discovery is the same: "a liberal discovery-type standard." *Loral Electronic Systems*, 253 NLRB 851; 853 (1980); *Acme Industrial*, supra at 432, 437. Thus information need not necessarily be dispositive of the issue between the parties, it need only have some bearing on it.

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Once the initial showing of relevance has been made, "the employer has the burden to prove a lack of relevance... or to provide adequate reasons as to why he cannot, in good faith, supply such information." *San Diego Newspaper Guild*, supra at 863, 867. Where the relevance of requested information has been established, an employer can meet its burden of showing an adequate reason for refusing to supply the information by demonstrating a "legitimate and substantial" concern for employee confidentiality interests which might be compromised by disclosure. *Detroit Edison v. NLRB*, 440 U.S. 301, 315, 318-320. In resolving issues of asserted confidentiality, the Board first determines if the employer has established any legitimate and substantial confidentiality interest and then balances that interest against the union's need for the information. *Detroit Edison*, id. At 315, 318; *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 30 (1982); *Pfizer Inc.*, 268 NLRB 916 (1984). However, where the employer fails to demonstrate a legitimate and substantial confidentiality interest, the union's right to the information is effectively unchallenged, and the employer is under a duty to furnish the information. *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348, 360 (D.C. Cir. 1983); *NLRB v. Jaggars-Chiles-Stovall, Inc.*, 639 F.2d 1344, 1346-1347 (5th Cir. 1981); *NLRB v. Associated General Contractors of California*, 633 F.2d 766 (9th Cir. 1980).

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Information requested to enable a union to assess whether a respondent has violated a collective bargaining agreement by contracting out unit work and, accordingly, to assist a union in deciding whether to resort to the contractual grievance procedure is relevant to a union's representative status and responsibilities. *AK Steel Corporation*, 324 NLRB 173, 184 (1997); and *Island Creek Coal Co.*, 292 NLRB 480, 490 (1989), *enfd.* 899 F.2d 1222 (6th Cir. 1990).

It was also stated in *Ormet Aluminum Mill Products*, *supra* at 802 that:

It cannot be said that a union would be fulfilling its statutory responsibility of policing a contract by blindly accepting a respondent's assertions as to the merits of a grievance, or for that matter what the requested information would show without being provided access to the underlying documents upon which those representations are made. While the Local was provided a summary by Respondent in November 1998, showing the number of skids purchased in 1997 and the cost per skid, this does not serve as a substitute for the Local's request for invoices from Williamson for the years 1996 and 1997. For the Local is entitled to the original documents, not just to unverified summaries made by Respondent's officials. In this regard, the Local is entitled to the base line information to formulate its own arguments rather just accepting positions posited by Respondent. Thus, it was entitled to the requested invoices. See, *Merchant Fast Motor Line*, 324 NLRB 563 (1997) (holding that a union was not required to accept a respondent's declaration as to profitability or summary financial information provided by the respondent); *McQuire Steel Erection, Inc.*, 324 NLRB 221 (1997), (summaries of payroll records deemed not sufficient to meet a respondent's statutory obligation); *New Jersey Bell Telephone Co.*, 289 NLRB 318, 330, *fn.* 9, (1988), *enfd.* *NLRB v. New Jersey Bell Telephone Co.*, 872 F. 2d 413 (3rd Cir. 1989) (summary of an employee's absence records found not to be acceptable, with the administrative law judge stating that a grievance under a collective bargaining agreement is analogous to a trial, wherein summaries may be offered by a party but it must make available to the other side the records on which the summary is based. *Fed. R. Evid.* 1006.); and *Pertec Computer*, 288 NLRB 810, 822, (1987) (the provision of a cost study insufficient absent access to the financial records from which the study was derived.)

See also *E. I. du Pont & Co*, 346 NLRB no. 55, *slip op.* at 5-6 (2006), a case also involving a subcontracting dispute, where the Board noted that, "In order to assess the accuracy of the Respondent's claims, it was necessary for the Union to examine the data that formed the basis for the Respondent's conclusions." In *E.I. Du Pont & Co.*, *supra* *slip op.* at 6, the Board stated the respondent's refusal to provide the union with requested information prevented the union from effectively creating a counter proposal to the respondent's subcontracting of unit work.

In *Pulaski Construction Co.*, 345 NLRB No. 66, *JD slip op.* at 8 (2005), the following was stated pertaining to confidential information:

The Board has found that a substantial claim of confidentiality may justify a refusal to furnish otherwise relevant information and the burden of proof is on the party asserting the claim. Blanket claims of confidentiality, however, will not be upheld. In defining the parameters of what constitutes confidential information the Board has developed the following guidelines:

Confidential information is limited to a few general categories; that which would reveal, contrary to promises or reasonable expectations, highly personal information, such as individual medical records of psychological test results; that

which would reveal substantial proprietary information, such as trade secrets; that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses; and that which is traditionally privileged, such as memoranda prepared for pending lawsuits.

5 *Detroit Newspaper*, supra at 1073. If it is determined that the information sought to be protected is confidential, the issue then becomes whether the defense was timely raised by the employer so that the parties could attempt to seek an accommodation of the employer's confidentiality concerns. It is not enough that an employer raise a confidentiality concern; it must then come forward with some offer to accommodate both
10 its concern and its bargaining obligation.

It does not appear that any of the information requested by the union falls within the description of confidential information as the Board has defined that concept. Even assuming that the request did encompass confidential information, Respondent had an obligation to discuss its confidentiality concerns with the union so as to try to develop
15 mutually agreeable protective conditions for disclosure of that information. *The Good Life Beverage Co.*, 312 NLRB 1060, 1062 (1993). Respondent's failure to raise this concern with the union vitiates its attempt to raise it now.¹³

20 In the instant case, the Unions verbally requested a copy of the RFP on June 1, when Respondent informed the union officials that Respondent was contemplating contracting out excess collections work. Teal requested the RFP to determine how the subcontracting would affect the pay, working conditions, and work performed by bargaining unit members. Teal wanted to know what the working conditions for the contractors would be, including the work they would be performing, the location, their pay, and whether they would interact with
25 bargaining unit employees. On June 8, the Unions renewed their request for the RFP's and informed Respondent its written summary of the RFP was not sufficient because Respondent's telling the Unions what was in the document and what Respondent thought the Unions should know was not sufficient in lieu of the provision of the actual document. During a meeting on June 16, Respondent was told by union officials that the summary was not sufficient because
30 the Union's did not know if it was accurate or complete.

By email dated June 20, Respondent informed the Unions the parties were at impasse in bargaining over excess collections work and Respondent decided to contract out the work. Respondent implemented the contract for contracting out the work on June 20. By email to
35 Respondent's officials, dated June 21, Teal renewed the Unions request for the RFP. By letter dated June 30, Reyes questioned the relevance of the RFP to the administration of the collective bargaining agreement, and for the first time raised confidentiality concerns concerning the provision of the RFP to the Unions.

40 By letter dated July 1, the Unions attorneys requested a copy of the RFPs and of all contracts between Respondent and the winning bidders. Respondent was informed the documents were necessary for the administration of the collective bargaining agreements with Respondent. By letter dated July 7, Respondent's counsel, in declining to provide the information, questioned its relevance and raised confidentiality concerns with the information
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¹³ See also *Pertec Computer*, 284 NLRB 810, 811 (1987), supplemented by 298 NLRB 609 (1990), enfd. as modified 926 F.2d 181 (2nd Cir. 1991), cert. denied 502 U.S. 856 (1991), holding "If the Respondent's broad assertion of confidentiality were to prevail here, unions would rarely be held entitled to any information that employers had reason to withhold from third
50 parties." The Board also stated, "the Respondent has not shown the Union to be unreliable in respecting confidentiality agreements."

associated with the Respondent's bid process. By letter dated July 8, the Unions attorneys filed a grievance over the contracting out of excess collections work citing several provisions in the parties' collective bargaining agreements. By letter dated July 11, the Unions attorneys, cited the grievance, and informed Respondent that the requested information was relevant and necessary to police the parties' collective bargaining agreements. Respondent was told, "The Unions need this information to determine the amount, under whose direction and supervision the work will be performed, and the type of work that will be performed by the outside contractors." It was stated the Unions were willing to accept the requested documents with certain "confidential" information such as economics redacted. By letter dated July 14, Respondent declined the Unions' request for the named documents stating the summary Respondent provided was sufficient. On July 20, the Unions filed an unfair labor practice charge stating the information was necessary for the policing of the collective bargaining agreements, and the processing of grievances. An amended charge was filed on October 20, stating the information was also needed for collective bargaining purposes.

The Unions followed up their information requests with a subpoena issued by the arbitrator requesting the RFPs for the contracting out of excess collections work and contracts with the winning bidders be produced at the December 2, arbitration hearing. Counsel for the Unions also requested that the documents be made part of the arbitration record during his opening statement to the arbitrator. Respondent's counsel interposed several objections including relevance, that the arbitrator had no authority to enforce the subpoena, that arbitrator, not the Unions, would have to go to court to enforce the subpoena, and that Respondent had provided all of the information to the Unions in an alternative form. Reyes testified the arbitrator described three options, one was to have the Unions go to court to enforce the subpoena, the other was for him to take an adverse inference, and the third was for him to look at the material in camera to decide whether it was relevant. Reyes testified arbitrator did not take any of these actions. Rather, Respondent's counsel suggested they go forward with the case and the arbitrator could make a decision concerning the subpoena later on if he felt it was necessary. The Unions agreed to go forward but stated they were not giving up their right to have the subpoena enforced. Reyes testified the arbitrator was told that a charge had been filed over the information request with the National Labor Relations Board.

On February 16, 2006, the arbitrator issued his award concerning the subcontracting out of excess collections work finding in favor of the Unions. The arbitrator found Respondent contracted with CCI to collect delinquent payments and to perform associated lock out/lock in work, and that CCI performed limited operations in 2005 for Respondent. The arbitrator stated Respondent intends to expand the program in the future, and noted its contract with CCI includes 2006 and 2007. The arbitrator also found CCI's employees performed the work of unit employees. The arbitrator found in contracting out the work, Respondent breached a binding past practice, and by doing so violated Article III, Section 3(a) and (b) of the management rights clause of two of the three applicable collective bargaining agreements. The arbitrator noted that although the contract with Local 654 did not contain the past practice language found in the management rights clause of the other two labor agreements, he stated a contract need not contain an express past practice provision for a past practice to become binding on the parties. The arbitrator issued a make whole remedy for the collections work performed in 2005, and he retained jurisdiction in the event the parties could not agree on the amount of back pay. The arbitrator refused the Unions request to issue a cease and desist order foreclosing Respondent from hiring contractor employees from performing this work in the future stating in general arbitrators lack the authority to issue such orders.

Based on the forgoing, I have concluded that the Unions established and appropriately apprised Respondent of the relevancy of the RFPs and ensuing contracts. Respondent

informed the Unions of the possibility of contracting out certain work, and honored the Unions request to bargain about keeping the work in house. Thereafter, Respondent provided the Unions with a written summary of the RFP, and answered questions raised by the Unions concerning the contracting out of the work. Respondent was told this was not sufficient to
 5 replace the RFP because the Unions had a right to verify the accuracy of Respondent's assertions, and the Unions may have omitted certain questions due to a lack of knowledge of the RFP's content. Respondent has parenthetically acknowledged the relevancy of the RFP by providing the Unions with information contained therein. Moreover, at various times Respondent was told the information was needed to bargain, to police the parties' contracts, to
 10 process a grievance, to determine the impact of the contracting out on unit employees, and to determine the amount and type of work to be performed by outside contractors. Any an all of the reasons asserted were sufficient to establish the relevance of the requested information. See, *Ormet Aluminum Mill Products*, supra; *Pulaski Construction Co.*, supra; and *Pertec Computer*, supra.

15 The Unions were entitled to review the original documents, and not to be limited to summaries and Respondent's representations as to the documents contents. See *Ormet Aluminum Mill Products*, supra at 802; and *E. I. Du Pont & Co*, supra slip op. at 5-6 (2006). This is particularly so here where Teal credibly testified Respondent informed the Unions that if a
 20 contractor employee locked out an account, a contractor employee would handle the associated lock in. Yet, Teal testified he subsequently learned that this was not the case, and that the lock ins of some contractor lockouts were being performed by bargaining unit employees. Teal testified this was a change for bargaining unit employees as they were now interacting with the contractor's employees by following up on their work. Along these lines, Reyes testified when
 25 the Unions were provided Respondent's RFP summary document, they asked questions on how the contractor was going to compensate its employees. Reyes testified, concerning the contractor's employees' payment structure, the Unions were told all Respondent knew was that the contractor's employees were going to be paid on a per task basis, and Respondent was not interested in how much they were being paid. Reyes testified bids were not due until June 13,
 30 which was after Unions requested this particular information. Yet, despite Respondent's claim of lack of knowledge to the Unions, Reyes testified the contractors' bids would estimate their costs including rates of pay for their employees. Reyes also testified the contractor's rates of pay would be included in the contract between Respondent and contractor once that company became the successful bidder. Thus, according to Reyes, Respondent received this information
 35 from the contractor shortly after the Unions made their information request, but it was not provided to the Unions. Similarly, by letter dated August 10, in response to a written information request, Reyes informed the Unions that the "Company has no specific knowledge of the payment structure of wages, compensation or benefits Contract Callers provides its employees." Yet, as set forth above, Reyes testified estimated rates of pay to the contractors employees
 40 would be included in the contractor's bid, and the actual rates of pay would be included in the contract, which was a document specifically requested by the Unions.

By letter dated July 11, the Unions attorneys informed Respondent the Unions needed a copy of the RFP and the contract with CCI "to determine the amount, under whose direction and
 45 supervision the work will be performed, and the type of work that will be performed by the outside contractors." Rounds testified Respondent included information in the RFP showing the number of and types of collections that were done. She testified that, in order for the bidders to provide cost estimates for the work, Respondent has to give them the projects technical requirements and the volume of the work. The Unions were successful in their grievance before
 50 the arbitrator, who ordered a make whole remedy. Yet, they were never provided information with the technical specifications as to the amount of work to be done in the subcontract to enable them properly assess damages, although Rounds' testimony reveals this information

was included in the RFP the Unions had requested. Thus, by admissions of Respondent's officials the RFP summary and Respondent's answers to the Unions' questions were either incomplete or sometimes inaccurate. The case law provides, as set forth above, that the Unions were entitled to copies of the original documents, and were not required to rely on Respondent's representations of what those documents contained. Accordingly, I have found the Unions' request for a copy of the RFPs and Respondent's contracts with the successful bidders was both relevant and necessary to the performance of their statutory functions.¹⁴

I also find that Respondent has not raised a legitimate and substantial confidentiality defense for its refusal to provide the requested documents. The Unions first requested a copy of the RFP on June 1 and repeated the request on June 8. The parties engaged in negotiations to discuss alternatives to contracting out the disputed work on June 1, 8, and 16. By email dated June 20, Respondent declared impasse and informed the Unions it had decided to contract out the work. In fact, Respondent implemented the contract on June 20. Yet, Respondent never informed the Unions of a confidentiality concern with respect to the requested RFP until June 30, ten days after it had declared impasse in negotiations. Thereafter, Respondent refused the Unions' request to provide a redacted document, and never apprised the Unions of the nature of the information in the RFP that was confidential. Respondent's concern over confidentiality, after its declaration of impasse, was not timely raised, and it never offered to negotiate with the Unions a means of providing the requested documents while protecting any legitimate concerns of confidentiality. See, *Pulaski Construction Co.*, supra, JD slip op at 8 (2005). Respondent has also failed to show the Unions to be unreliable in respecting confidentiality agreements. See, *Pertec Computer*, supra at 811.¹⁵

¹⁴ *Winn-Dixie Stores, Inc.*, 224 NLRB 1418, 1441-1443 (1976), cited by Respondent, is inapposite to the situation herein. In *Winn-Dixie* the union requested the names of employees company wide with 20 or more years of service in relation to its proposal for increased vacation benefits for employees in that category. The employer took the position that the union's proposal could impact 18,000 employees. The employer presented the union with a computer generated record showing the number of employees with 20 or more years of service, but claimed that in order to obtain the employees names it would have to go through the burdensome process of individually reviewing employees' personnel files. Id at 1442, fn. 61. The judge concluded the computer generated statistical data satisfied the need for the information articulated by the union, and since the data was not inherently suspect, the union did not need the employees names to cross check the data provided. The judge distinguished *General Electric Company*, 186 NLRB 14 (1970), noting a violation was found there because the information provided the union by way of a video tape was not in a form that would adequately provide the union with relevant information. See *Winn-Dixie Stores, Inc.*, supra at 1442-1443, fns. 62 and 64. There is no contention in the present case that Respondent's provision of the RFP and related contracts is burdensome. I do not find Respondent's picking and choosing what information it deems the Unions need from the underlying requested documents to constitute an adequate substitute for the provision of the requested documents. The Unions have not even been provided such basic information to allow them to accurately calculate the amount of back pay owing unit members as a result of a recent arbitration award.

¹⁵ Rounds' testimony reveals that, in addition to the bidding contractors, people within Respondent's procurement department, the project manager and project team consisting of engineers, professionals, and department heads see an RFP. Members of the Respondent's legal department may also see the RFP. No information was given as to whether these individuals were required to sign confidentiality agreements, or why they should be trusted with the information any more than a select group of union officials performing their representative functions. Moreover, the confidentiality provision in Respondent's service contract reveals that

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Respondent's witnesses also failed to testify as to any legitimate confidentiality concerns with respect to the RFP and contracts in dispute. Reyes testified that the requested RFP was "Probably (a) very low risk problem." Reyes testified, "I haven't looked at it since last June. And at that time I don't think I looked at it specifically to say that any one aspect of that was confidential." Reyes testified he did not know whether there was anything particularly sensitive in this particular RFP. Reyes testified concerning the RFP, "I can't recall my review of it back in June if that there was anything that identified confidentiality to me." Reyes could only claim Respondent had a practice of not disclosing RFPs and they required the bidders to sign off on a confidentiality agreement. Similarly, Respondent witness Rounds took great pains to articulate the need for confidentiality of Respondent's RFP process. Yet, the only specific claims she could testify to concerning the need for confidentiality of the excess collections RFP were that the document included information showing the number of and types of collections that were to be done by the outside contractor, which Rounds viewed as sensitive information. I do not view this type of information as confidential. In fact it goes to the heart of any back pay claims the Unions might have, and their ability to negotiate alternative means to outsourcing of the work if they elect to do so.¹⁶ Respondent has failed to establish anything confidential about the requested information except for blanket claims of confidentiality. The Board has found that such claims do not justify a refusal to furnish requested information, and I see no reason to make such a finding here. See, *Pulaski Construction Co.*, supra, JD slip op at 8 (2005), and *Pertec Computer*, supra at 811. Thus, I have concluded Respondent has not established a legitimate and substantial claim of confidentiality under the Act's requirements.

Respondent has raised other defenses to the provision of the requested information claiming the Unions did not raise an allegation that they needed the information for bargaining until October when they filed the amended unfair labor practice charge, that the proposals made by the parties prior to Respondent's declaration of impasse were not dependent on the information contained in the RFP, and the provision of the information for bargaining future contracts is premature. I do not find any of these contentions to be persuasive. First, the Board has held a respondent can be apprised of the relevancy of requested information even through the testimony of union officials at the unfair labor practice hearing. See *Ormet Aluminum Mill Products*, supra at 802; and *Ohio Power Co.*, 216 NLRB 987, 990-991, fn. 9 (1975), enf'd. 531 F.2d 1381 (6th Cir. 1976). The fact that the parties made limited proposals during their negotiations concerning the proposed subcontracting can in part be attributed to Respondent's failure to provide the Unions with the requested information. In this regard, the Unions were not provided with the scope of the proposed subcontracting as well as other details that may have allowed them to formulate other proposals. Thus, the Unions in seeking to keep the work for bargaining unit employees were at a severe disadvantage to the outside contractors who had

not only is the service firm privy to the RFP, but the information may be given to the service firm's subcontractors and their employees. Thus, the only individuals with a need to know the contents of the RFP whom Respondent claims it could not trust because of confidentiality concerns were the Union officials who have a statutory obligation to represent the bargaining unit employees. I find Respondent's refusal to tender the underlying requested documents to the Unions was based on reasons other than concerns of confidentiality. Rather, I find Respondent wanted to maintain whatever advantage it could in negotiations with the Unions, and in the ensuing grievance and arbitration proceedings by not providing the requested documents.

¹⁶ Rounds was not involved in the decision to deny the Unions' request for the RFP and contracts, and Reyes, who was involved could articulate no confidentiality concerns specific to the documents at issue.

access to the complete RFP in formulating their bids. By failing to provide the Unions with the requested information, Respondent undermined their ability to make counterproposals beyond their contention that Respondent was violating the contract with its actions. See, *E.I. Du Pont & Co.*, 346 NLRB No. 55, slip op. at 6 (2006). Moreover, the arbitrator found Respondent violated the collective bargaining agreement by contracting out the work in 2005 and issued a make whole remedy. The requested information is certainly relevant for bargaining between the parties as to the amounts due under the arbitrator's decision. The arbitrator, while noting Respondent's contract with CCI called for CCI to perform the work on larger level in 2006 and 2007, stated it was not within the arbitrator's authority to issue a cease and desist order. Thus, the requested information is also relevant to bargaining over Respondent's future plans and grievances and remedies for possible future contract violations. I also find the Unions are entitled to the requested information as background information to consider when the parties bargain collective bargaining agreements in the future.¹⁷

Respondent also contends the Unions sought the requested information in bad faith. Respondent bases this argument on testimony by Reyes that one of the union officials stated on June 8, that the Unions were going to file an unfair labor practice charge whether or not Respondent provided the requested information. Respondent also references Teal's pre-hearing affidavit where he described his view of shortcomings of Respondent's written summary of the RFP without mentioning that Respondent had provided some of the information he described as missing from the RFP summary verbally during meetings in response to the

¹⁷ While the Unions did not seek to enforce the arbitrator's subpoena request for the information, I would not find this as an impediment to the Unions' unfair labor practice charge seeking the information. In *Chesapeake and Potomac Telephone Co. v. NLRB*, 687 F.2d 633 (2nd Cir. 1982), the court, in enforcing a Board order, found the respondent employer violated Section 8(a)(1) and (5) of the Act by its refusal to provide certain requested information where the information request was made in the form of subpoenas issued by an arbitrator. The court stated as follows:

Other circuits have held that '(t)he duty of an employer to furnish information relevant to the processing of a grievance does not terminate when the grievance is taken to arbitration.' *Cook Paint & Varnish Co. v. NLRB*, 648 F.2d 712, 716 (D.C. Cir. 1981). Accord *NLRB v. Davol, Inc.*, 597 F.2d 782, 786-87 (1st Cir. 1979). Although the issue was not raised, we recently enforced a Board order requiring a company to furnish information even though the union involved had already invoked arbitration. *NLRB v. Designcraft Jewel Industries, Inc.*, 675 F.2d 493 (2d Cir. 1982). The Board has consistently held that the duty to disclose does not cease when a union invokes arbitration. See, e.g., *St. Joseph's Hospital (Our Lady of Providence Unit)*, (233 NLRB 1116, 1119 (1977); *Fawcett Printing Corp.*, 201 NLRB 964, 972-73 (1973); *Fafnir Bearing Co.*, 146 NLRB 1582, 1586 (1964), enforced 362 F.2d 716 (2d Cir. 1966). We agree.

The Unions requested the information in the instant case before and after filing a grievance, and before invoking arbitration. The Unions requested concrete information, and not information such as names of witnesses that might be considered pre-arbitration discovery. See, *Ormet Aluminum Mill Products*, supra at 790. Finally, the statutory enforcement of the Unions' information request facilitates the arbitration process by enabling parties to settle or drop grievances prior to bearing the costs of arbitration. See *NLRB v. Acme Industrial Co.*, 384 U.S. 432, 438 (1967). Here the Unions went through arbitration without receiving the requested information and still do not have information as to the scope of the work in 2005 to work out an informed back pay award with the Respondent, nor do they have sufficient information as to the scope of future work scheduled under the subcontract to appropriately perform their representative functions.

questions of Union officials. Finally, Respondent cites the fact that the Unions sought to publicize the dispute between the parties as a means of pressuring Respondent in support of its bad faith theory. I find all of these arguments to be lacking in merit. First, considering Reyes' demeanor and the accuracy of some of his responses to the Union's information request, his belated claims of confidentiality to the Union, and his inability to describe anything specifically in the RFP that Respondent actually considered confidential, I do not credit Reyes testimony that a union official stated the Unions would file a charge even if the information was provided. I also note that after June 8, the Unions filed a grievance over the contracting out of the work, that the Unions' attorneys twice requested the information in writing and provided a detailed explanation to Respondent as to why the information was necessary including the need to assess the scope of the subcontracting. Thereafter, the Unions took the case to arbitration, and the Unions attorneys sought the assistance of the arbitrator in obtaining the information. The Unions went to great lengths to preserve unit work and sought the requested information to assist them in doing so as an aid in the grievance procedure and in negotiations with Respondent. Their request for the information was clearly not made in bad faith. I also found Teal to be a credible witness to the extent his memory would permit, and note that the section of his affidavit cited by Respondent is only discussing Respondent's written summary. I do not find that his omission from that affidavit of what the Unions were orally informed at the meetings between the parties was part of a nefarious plot as Respondent attempts to portray it. There is a difference in terms of proof based on what a party is supplied in writing, and what they must establish through oral testimony at an arbitration hearing. In plain fact, Teal may have only been asked about the shortcomings of Respondent's written summary when he gave the affidavit to the Board agent. In any event, the Union has established the relevance and its legitimate need for its request for the RFP and related contracts, and Respondent has failed to establish any legitimate defense in refusing to produce the requested documents. Accordingly, I find by its actions Respondent has violated Section 8(a)(1) and (5) of the Act.¹⁸

¹⁸ Respondent contends the Union waived the right to certain information contained in the RFP by statements in a June 23 email from Teal to Respondent, and in a July 11 letter by the Unions counsel to Respondent. In the email, Teal requested the RFP and stated "as stated, this does not need to include costs." In the July 11 letter, the Unions' attorneys stated while requesting the RFPs and contracts for the winning bidders that, "the Unions are willing, however, to accept the requested documents with certain 'confidential' information, such as the economics, redacted." Respondent contends in its brief that the Unions waived certain information by qualifying their information requests. However, I do not view the Unions' statements as such. Respondent never informed the Unions what it considered to be confidential in the RFPs or the contracts. The Unions were negotiating against themselves concerning confidentiality to reach an accommodation with Respondent, when Respondent refused to negotiate with them about the provision of the requested documents. I do not find through the testimony of Respondent's witnesses that Respondent has established any aspect of the requested documents contain confidential information. I also find Respondent's claims of confidentiality concerning the requested information, after it had already declared impasse in the subcontracting negotiations, were untimely raised. Moreover, it thereafter refused to negotiate with the Unions the provision of the documents in a manner to protect its alleged confidentiality concerns. Respondent should not be rewarded for its conduct by having these documents redacted in any fashion, or in further delay in the provision of the documents by requiring the Unions to negotiate a confidentiality agreement over documents for which Respondent has failed to establish contain confidential information. It is therefore my recommendation that the complete documents be tendered to the Unions. For reasons set forth above, I do not find the Unions' request for the documents to be moot as Respondent contends in its brief.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. At all material times the Unions have been the exclusive collective bargaining representatives of Respondent's employees in bargaining units that are appropriate for collective bargaining within the meaning of Section 9(b) of the Act and which are set forth in the Unions' collective bargaining agreements with Respondent.

4. The Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide relevant requested information to the Unions since June 1, 2005, in the form of copies of the request for proposals for the contracting out of excess collection of delinquent customers accounts; and since July 1, 2005, failing to provide copies of all contracts between Respondent and the winning bidder(s) concerning the excess collection of delinquent customer accounts.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁹

ORDER

The Respondent, National Grid USA Service Company, Inc., which maintains an office and place of business in Westboro, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Refusing to provide Utility Workers Union of America, Locals 310, 317, 322, 329, 330 and 654, requested information necessary for the performance of their functions as collective bargaining representatives of National Grid USA Service Company, Inc.'s employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish Utility Workers Union of America, Locals 310, 317, 322, 329, 330 and 654, copies of the request for proposals for the contracting out of the excess collection of delinquent customers' accounts; and copies of all contracts with the winning bidder(s) concerning the excess collection of delinquent customer accounts.

(b) Within 14 days after service by Region 2, post at all its facilities where members of the collective bargaining units represented by Utility Workers Union of America, Locals 310, 317, 322, 329, 330 and 654, work copies of the attached notice marked "Appendix."²⁰ Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted in the locations specified including the Employer's internet website.

¹⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

²⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent on or after June 1, 2005.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 14, 2006

Eric M. Fine
Administrative Law Judge

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to provide Utility Workers Union of America, AFL-CIO, Locals 310, 317, 322, 329, 330 and 654, requested information necessary for the performance of their functions as collective bargaining representatives of National Grid USA Service Company, Inc.'s employees in bargaining units as described in our collective bargaining agreements with those Unions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish Utility Workers Union of America, Locals 310, 317, 322, 329, 330 and 654 copies of the request for proposals for the contracting out of the excess collection of delinquent customers' accounts; and copies of all contracts with the winning bidder(s) concerning the excess collection of delinquent customer accounts.

NATIONAL GRID USA SERVICE COMPANY, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

10 Causeway Street, Boston Federal Building, 6th Floor, Room 601

Boston, Massachusetts 02222-1072

Hours of Operation: 8:30 a.m. to 5 p.m. 617-565-6700.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 617-565-6701.